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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Application Serial No. 76/055,076  
Published in the *Official Gazette* on March 26, 2002  
For the Mark: NGENIUS PROBES



06-14-2002

U.S. Patent & TMO/TM Mail Rcpt Dt. #74

ENGENIUS, INC.,

Opposition No.

Opposer,

v

NETSCOUT SYSTEMS, INC.,

Applicant.

**NOTICE OF OPPOSITION**

Assistant Commissioner for Trademarks  
2900 Crystal Drive  
Arlington, VA 22202-3513  
**BOX TTAB FEE**

02 JUN 21 AM 12:38

TRADEMARK TRIAL AND  
APPEAL BOARD

Engenius, Inc., a corporation organized and existing under the laws of the State of Michigan, with a principal place of business at 31077 Schoolcraft, Livonia, Michigan 48150, believes that it would be damaged by the issuance of a registration for the trademark NGENIUS PROBES, applied for in application Serial No. 76/055,076, filed on May 23, 2000 by Applicant for "computer hardware and software for managing computer networks, namely, hardware and software to monitor, analyze, identify, report, troubleshoot, and forecast the performance and efficiency of application and content delivery over network infrastructures in International Class 9", and therefore opposes the same. As grounds for the opposition, Opposer, by its attorneys

Young & Basile, P.C., alleges as follows:

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1. Since at least as early as April 1997, Opposer has been manufacturing, distributing, and selling a radio frequency vehicle monitoring system under the trademark "ENGENTIUS."

2. Opposer has had substantial sales of said systems bearing the "ENGENTIUS" mark over the last five years and has invested a substantial amount of time, effort and money in promoting and advertising its mark and in ensuring the high quality of the goods provided under the mark.

3. Opposer is the owner of federal trademark registration number 2,316,049, issued February 8, 2000, for the stylized mark ENGENTIUS. Said registration covers the following goods: "radio frequency vehicle monitoring system, namely, a vehicle diagnostic communication network comprised of computer hardware and computer software that detects and stores information regarding engine performance and regarding the performance of other systems of a vehicle, namely, ABS criteria; safety and fire suppression units; fuel monitoring systems; wheel chair deployment systems; GPS systems and radio frequency vehicle gateway and short and long term range capabilities; and that downloads such information to a host computer on a selective real-time basis or that downloads such information via an interrogator to a data base to permit the creation of maintenance and managerial reports regarding the vehicle and the host computer in International Class 9."

4. Opposer is also the owner of the federal trademark application for the mark "ENGENTIUS" filed August 7, 2000. Said application was assigned serial number 76/104,975 in International Class 9. The date of first use stated in the application is April 8, 1997. The application covers the following goods: "radio frequency vehicle monitoring system, namely, a vehicle diagnostic communication network comprised of computer hardware and computer software that detects and stores information regarding engine performance and regarding the

performance of other systems of a vehicle, namely, ABS criteria; safety and fire suppression units; fuel monitoring systems; wheel chair deployment systems; GPS systems and radio frequency vehicle gateway and short and long term range capabilities; and that downloads such information to a host computer on a selective real-time basis via radio and cellular communications; or that downloads such information via an interrogator to a data base to permit the creation of maintenance and managerial reports regarding the vehicle and the host computer." Action on said application has been suspended pending disposition of a number of applications including the one opposed here.

5. Because of Opposer's extensive use and promotion of these marks, they have acquired substantial value and have become known to the public and trade as identifying and distinguishing Opposer exclusively and uniquely as the source of products to which the marks are applied.

6. On May 23, 2000, Applicant filed an application to register the mark "NGENIUS PROBES" in International Class 9 for "computer hardware and software for managing computer networks, namely, hardware and software to monitor, analyze, identify, report, troubleshoot, and forecast the performance and efficiency of application and content delivery over network infrastructures in International Class 9" based on a bona fide intent to use the mark. Applicant's date of filing, and the only date on which it can rely, is long after Opposer's date of first use and after the registration date of Opposer's stylized 'ENGNIUS" mark.

7. Applicant's "NGENIUS PROBES" mark is nearly identical in all material respects to Opposer's "ENGNIUS" mark. The marks of the parties present the same general commercial impression and are very similar in appearance, sound, and meaning.

8. Not only are the marks at issue nearly identical, but the goods identified by the marks are closely related as well. Applicant states that it intends to use the mark "NGENIUS PROBES" for "computer hardware and software for managing computer networks, namely, hardware and software to monitor, analyze, identify, report, troubleshoot, and forecast the performance and efficiency of application and content delivery over network infrastructures in International Class 9." These goods are closely related to the goods upon which Opposer uses its "ENGENIUS" mark.

9. Upon information and belief, Applicant applied to register the mark "NGENIUS PROBES" with full knowledge of Opposer's rights to the mark "ENGENIUS."

10. Applicant's application and the presumption of exclusivity that would come from a registration to Applicant of the "NGENIUS PROBES" mark sought to be registered is inconsistent with the prior rights of Opposer in the "ENGENIUS" mark.

11. The use by Applicant of a virtually identical mark for closely related goods is likely to create the erroneous impression that Applicant's goods originate from, come from, or are otherwise associated with Opposer or Opposer's "ENGENIUS" goods or that Applicant's goods are endorsed, sponsored, or in some way connected with Opposer. Any use of the mark "NGENIUS PROBES" by the Applicant is, therefore, likely to cause confusion, cause mistake or to deceive the public into the belief that the goods offered under the mark "NGENIUS PROBES" come from or are otherwise authorized or sponsored by Opposer in violation of section 2(d) of the Lanham Act, 15 U.S.C. §1052(d).

12. By reason of the foregoing, Opposer will be damaged by the registration of the mark "NGENIUS PROBES" to Applicant.

WHEREFORE, it is respectfully requested that this opposition be sustained and that the registration sought by Applicant, Application Serial No. 76/055,076 be denied.

Duplicate copies of this notice of opposition as well as the opposition fee in the sum of \$300.00 are filed herewith.

Respectfully submitted,

YOUNG & BASILE, P.C.

A handwritten signature in black ink, appearing to read "James B. Brady", written in a cursive style.

James B. Brady  
Attorney for Opposer  
(248) 649-3333

3001 West Big Beaver Rd., Suite 624  
Troy, Michigan 48084-3107

Dated: June 12, 2002  
JBB/jaf

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CERTIFICATE OF MAILING AND TRANSMITTAL LETTER

Assistant Commissioner for Trademarks  
2900 Crystal Drive  
Arlington, VA 22202-3513  
**BOX: TTAB FEE**

Sir:

Transmitted herewith is a postcard, Notice of Opposition and check in the above-identified trademark application.

X A check in the amount of \$300.00 is attached.

X Please charge any additional fees or credit overpayment to Deposit Account Number 25-0115.

I hereby certify that this correspondence is being deposited with the United States Postal Service as First Class Mail in an envelope addressed to: Assistant Commissioner for Trademarks, Box TTAB FEE, 2900 Crystal Drive, Arlington, Va. 22202-3513, on June 12, 2002.

Respectfully submitted,  
YOUNG & BASILE, P.C.

James B. Brady  
Attorneys for Opposer  
(248) 649-3333

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Troy, Michigan 48084-3107  
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